

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T. SANKARAN

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

CRP.No. 1255 of 2003

(CMA.720/2002 of I ADDL. DISTRICT COURT, TRIVANDRUM
IA 7996/2002 IN OS.30/1999 of III ADDL.MUNSIFF'S COURT,TRIVANDRUM)

REVN. PETITIONER/APPELLANT/PETITIONER/DEFENDANT

K.VIJAYARAJAN,
S/O LATE EDAMANA GOVINDANKUTTY MENON, AGED 61,
ROOM NO.41, SUNDAR LODGE, MANJALIKULAM ROAD,
THIRUVANANTHAPURAM.

BY ADV. SRI.R.T. PRADEEP

RESPONDENT/RESPONDENT/COUNTER PETITIONER/PLAINTIFF

M.SOMARAJAN, T.C.NO.23/1022,
MADHAVAM, METTUKADA, THYCAUD P.O.,
THIRUVANANTHAPURAM.

BY ADV. SRI.B.KRISHNA MANI
ADV. SMT.ASHA JYOTHI
ADV. SRI.PRINCE THOMAS GEORGE

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 27/11/2007 , THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

C.R.P. NO. 1255 OF 2003

ORDER ON I.A.NO. 245 OF 2003 IN C.R.P. NO. 1255 OF 2003

DISMISSED.

27.11.2007

SD/- K.T. SANKARAN, JUDGE.

/TRUE COPY/

P.A. TO JUDGE.

K.T. SANKARAN, J.

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C.R.P. No. 1255 OF 2003
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Dated this the 27th November , 2007

ORDER

The petitioner, who is the defendant in O.S.No. 30 of 1999 on the file of the court of the III Addl. Munsiff, Thiruvananthapuram was set ex parte. An ex parte decree was passed against him on 28.02.2001. The suit was filed by the respondent claiming arrears of rent from the petitioner who was the tenant of the respondent . An application for setting aside the ex parte decree was filed on 24.09.2002. There was delay of 542 days in filing the application for setting aside the ex parte decree. An application under section 5 of the Limitation Act was filed to condone the delay in filing the application under Order IX Rule 13 of the Code of Civil Procedure. The trial court dismissed the application for condonation of delay and consequently dismissed the application for setting aside the ex parte decree. The petitioner challenged the order of the trial court in C.M.A.No. 720 of 2002 on the file of the court of the I Addl. District Judge, Thiruvananthapuram. The learned District Judge dismissed the appeal confirming the order passed by the trial court.

2. The revision petitioner contended that he was set ex parte and the ex parte decree was passed against him only due to the default of his counsel.

The petitioner had entrusted 21 cases with the same counsel and he did not properly conduct those cases. The petitioner had filed a criminal complaint against his own advocate, who is a retired District Judge. The petitioner also filed a petition before the Bar Council of Kerala pointing out the alleged professional mis-conduct of his advocate. The criminal case was filed against the advocate in 2001 itself and the case was numbered as C.C.No. 663 of 2001 . In spite of the fact that an application was made before the Bar Council of Kerala and a criminal case was filed against the advocate in 2001, the petitioner did not file an application to set aside the ex parte decree till 24.09.2002 which resulted in the delay of 542 days.

3. The petitioner was examined as P.W.1 before the trial court . The trial court considered the oral evidence of P.W.1 and the facts and circumstances of the case and came to the conclusion that there is no justifiable reasons for condoning the delay of 542 days. It was also held by the trial court that the petitioner was not at all diligent in prosecuting his case and that it cannot be presumed that the petitioner's counsel was negligent in conducting the cases. Even after a criminal case was initiated against the counsel and a petition was filed against him before the Bar Council of Kerala, the petitioner could not entertain a belief that the same counsel would look after the affairs in respect of the cases and would intimate the petitioner about the developments in respect of the cases. After the initiation of the criminal case and after filing the petition

before the Bar Council of Kerala, there was no justification for the petitioner not to enquire about the cases and to take proper steps to file an application under Order IX Rule 13 of the Code of Civil Procedure. As rightly held by the trial court, the petitioner was negligent and there is no valid explanation for the inordinate delay in filing the application to set aside the ex parte decree. The appellate court agreed with the view taken by the trial court and held that the trial court was justified in dismissing the application for condonation of delay and consequently in dismissing the application under Order IX Rule 13 of the Code of Civil Procedure. I do not find any merit in the contention put forward by the petitioner that the delay was occasioned only due to the mis-conduct on the part of his lawyer. Learned counsel for the petitioner relied on the decision in N. Balakrishnan vs. M. Krishnamurthy (AIR 1998 SUPREME COURT 3222) in support of his contention that when a lawyer is involved in a mis-conduct which caused prejudice to his client and which resulted in delay in filing proper application for setting aside the ex parte decree, liberal approach should be taken in favour of the petitioner by the court in dealing with the application for condonation of delay. In Balakrishnan's case, the defendant in a suit for declaration of title and consequential reliefs was declared ex parte on 28.10.1991. The defendant moved an application for setting aside the ex parte decree. But that application was dismissed for default on 17.02.1993. The

counsel did not inform the defendant about the dismissal of the application. Later, after a lapse of 883 days, the defendant moved an application to set aside the order dismissing the application. In that factual background, the Supreme Court held in paragraph 13 of the judgment as follows:

“It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss.”

4. The factual position in the present case is quite different. It is stated that the petitioner was defendant in 21 cases. He engaged a retired District Judge as his lawyer. He had difference of opinion with his lawyer. He filed a criminal case against the lawyer and moved the Bar Council of Kerala for taking action against the lawyer for professional mis-conduct. Though the petitioner

was diligently prosecuting his case against the lawyer, he was not diligent enough to file an application to set aside the ex parte decree passed against him. I am of the view that no case is made out for condoning the delay in filing the application to set aside the ex parte decree.

There is no ground for interference under section 115 of the Code of Civil Procedure. The revision lacks merit and it is dismissed. No order as to costs.

**K.T. SANKARAN,
JUDGE.**

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C.R.P. No. 1255 OF 2003

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K.T. SANKARAN, J.

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C.R.P. No. 1255 OF 2003

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Dated this the 27th November, 2007

ORDER